

**Testimony of Kevin J. Kennedy  
Director and General Counsel  
Wisconsin Government Accountability Board**

**Assembly Committee on Campaigns and Elections  
Senate Committee on Elections and Local Government**

**October 13, 2015**

**Room 412 East, State Capitol  
Public Hearing**

**2015 Assembly Bill 388, 2015 Senate Bill 294**

Chairperson LeMahieu, Chairperson Bernier and Committee Members:

The Government Accountability Board has not met to discuss taking a position on this legislation. I am appearing here in my capacity as the Director and General Counsel for the Board. In that capacity I am speaking in opposition to the proposed legislation to eliminate the Government Accountability Board and replace it with two separate Commissions overseen by Commissioners selected on a partisan basis.

In addition to articulating the reasons why I believe this legislation is bad policy for the citizens of Wisconsin, I have attached a list of technical issues the agency staff has identified. The list contains sufficient annotations to enable the drafter to correct these errors if that is the directive of the Committees.

This legislation is about one thing – exerting political control over the independent executive branch agency charged with administering and enforcing campaign finance, election, ethics and lobbying laws. The reasons given for doing away with the G.A.B. are based on inaccurate, incomplete and, in many cases, completely false assertions by the proponents of this legislation. This legislation appears to be rooted in the unfounded belief that non-partisan judges base their decisions on hidden political agendas and not on an objective analysis of the law’s application to specific facts.

The bill’s authors say they want to bring transparency and accountability to the new Commissions, but this bill will not do that. The only real change is to add partisan labels to the Commissioners. The bill does nothing to lift the veil of secrecy imposed on the current practices of the Government Accountability Board’s advice, compliance and enforcement work.

The timing of the legislation is all wrong as we embark on a presidential election year similar to the 2000 election cycle and implement the voter identification law. An evenly-balanced Commission of partisans is likely going to ensure gridlock on crucial administrative and enforcement issues during the 2016 election cycle and for years to come.

On a substantive note, the proposed legislation is premised on the mistaken assumption that the investigative and advice functions of the two Commissions are identical. In fact the advice given to election officials and the enforcement actions taken with respect to elections differ markedly from the advisory and compliance functions exercised with respect to campaign finance, ethics and lobbying.

### **Legislative Control**

This bill would give the Legislature more control over the executive branch's administrative and compliance functions for campaign finance, elections, ethics and lobbying than it has over any other executive branch agency. Legislative leadership already has statutory authority to provide advice and direction to the Government Accountability Board. Current law requires the Joint Committee on Legislative Organization to be advisory to the Government Accountability Board on all matters related to the operations of the Board, yet legislators have never exercised this power.

Instead, legislators have engaged in a continuing series of exaggerated and unfounded critiques of the Board in the media. These "horror stories" range from the agency's handling of recall petitions to gross mischaracterizations of the findings of the Legislative Audit Bureau. They wrongly accuse the staff of being out of control, rogue and overtly partisan – based purely on a belief that professional employees are somehow incapable of making non-partisan, unbiased decisions and recommendations. They claim Board Members are being led around by staff and lack the required subject matter expertise to make informed decisions.

These are the assumptions of a perspective in which all actions and decisions are filtered through a partisan lens, rather than the reality of a professional staff that comes to work every day committed to doing their jobs. I know for a fact, based on feedback from legislators, your staffs and your campaign representatives, our customer service, responsiveness, and commitment to continuous improvement is second to no other state agency.

For more than eight years, staff reports and the Board's deliberations and actions on elections, administrative rulemaking -- and most notably the 2011/2012 recalls and recounts -- have been public. Much of it has been captured on Wisconsin Eye and is fully available for the public to see and judge for itself.

Simply put, the alleged actions cited in support of this legislation have been sensationalized. They lack merit and credibility. I have been patient and restrained in responding to personal attacks; it is time to focus on what is best for Wisconsin citizens and voters.

### **Lack of Transparency and Accountability**

Allegations of a lack of transparency and accountability by the agency persist despite the visual record of Board activity on Wisconsin Eye. This new legislation does not open up staff analysis or Commission action on requests for advice, compliance efforts or enforcement decisions. The same requirements for confidentiality concerning requests for advice under current law remain in the proposed legislation. The deliberations and discussion of the Commissions concerning investigations remain hidden behind the same statutory restrictions applicable to the Government Accountability Board. The same criminal penalties are in place if Commission staff or Commissioners disclose investigative activity except as permitted by law.

The only additional information the public gets is the knowledge that three of the Commissioners have Democratic affiliations and three have Republican ties. Transparency will extend only to the partisan appointees of the Commissions and not to the public at large. Candidates and public officials may be spared the public embarrassment resulting from allegations of wrongdoing, regardless of their merit, but the political insiders will be privy to that confidential information.

The Legislature gave the G.A.B. a specific directive to investigate potential violations of campaign finance laws. In the most controversial of its investigations, the Board unanimously found that the evidence presented to it warranted investigating whether any laws were broken, a decision it never takes lightly. It was based on the law as it had existed and had been enforced for decades. All of that discussion was in closed session and would still be under this bill.

A more honest discussion and evaluation of the Government Accountability Board could be had if the Legislature were to remove the statutory restrictions on advice and investigations with respect to campaign finance and lobbying. In any event, for the public to have confidence in the new Commissions, these restrictions need to be lifted.

### **The Perils of Partisanship**

The agency's critics keep claiming there is rampant partisanship of staff and Board decisions. Yet, they cannot substantiate a single decision that was made for partisan purposes. The fact that one side or the other is unhappy with a decision does not make it a partisan decision. When challenged in court, recall decisions that cut both ways were

upheld every single time. We regulate elected officials and candidates, so the Board's policy and enforcement decisions often necessarily have consequences for politicians. But that does not mean that the staff and the Board base their recommendations and decisions on political considerations. The recent LAB audit confirmed that reality.

We need look no further than Washington DC to see the effects of a bipartisan commission. The Federal Elections Commission has been moribund on key decisions for its 40 plus years of existence. This ongoing stalemate perpetuates the status quo on federal campaign finance issues. This oversight gridlock reflects the prevailing critique of the federal government.

### **The Differences between Elections and Ethics**

Turning to the substance of the proposed legislation, it fails to recognize fundamental differences between advice and enforcement related to elections and advice and enforcement related to campaign finance, ethics and lobbying. There are almost no civil forfeitures applicable to violations of the Elections Code. District Attorneys are responsible for prosecuting election violations, most of which contain a criminal penalty. The Government Accountability Board has the authority to issue orders compelling a local election official to conform his or her conduct to law. There are no forfeiture actions brought against an election official for abuse of his or her discretion or acting contrary to law.

The bill retains the process of reviewing the actions of local election officials and issuing findings and orders if necessary. But the bill inserts complicated and irrelevant provisions for the investigation of complaints related to elections which are not only unnecessary but also contradictory. It incorrectly assumes that the end result of election-related complaints is a possible prosecution and monetary penalty, which merits some degree of confidentiality.

In the case of advice provided to local election officials and the public regarding election laws, there is also no reason this should be secret. The proposed legislation has several contradictory provisions dealing with the confidentiality of advice and Commission deliberations related to election issues. This primarily comes from leaving intact current provisions in Chapter 5 designed to apply to advice and investigations related to campaign finance, ethics and lobbying. This appears to be a drafting oversight that would have significant adverse consequences for the efficiency of the proposed Elections Commission and for the public.

The legislation should be changed to make clear that advice on election issues is public. Similarly Commission actions to ensure local election officials conform their conduct to law should continue to be public. There is no justification for shielding the elections-

related guidance and findings from interested parties or the public when the matter will not result in prosecution or fines. As illustrated by the G.A.B.'s administration of the 2011 statewide recount, complete transparency is always better in the world of election administration. It is what inspires confidence in the conduct of our elections and their results.

## **Conclusion**

The Government Accountability Board is indeed an experiment – a successful one that has served the people of Wisconsin well. The proof is that under the Board's stewardship, Wisconsin is consistently recognized for the high quality and professionalism of its elections. Similarly, our campaign finance and lobbying programs have been a model for other states. Together, the elections and ethics divisions provide exceptional customer service to Wisconsin's voters, local election officials, candidates and state public officials.

On Thursday, we will distribute our 2013-2014 biennial report which describes the Board's many and varied accomplishments. It is filled with examples of how the staff of the G.A.B., in partnership with local election officials and other constituencies, has remained a leader in the administration of the laws under its jurisdiction. In our use of technology, as well as our communications, responsiveness, and customer service to every local clerk, every legislative office, every candidate and political committee, every lobbyist and lobbying principals, every public official, and every voter, our staff goes the extra step to provide excellent service under the general supervision of a deliberative and unbiased board. The G.A.B. is an agency that listens to constructive criticism and improves, not one that should be scrapped.

If you want change, rather than enact this legislation, I urge you to seriously consider making two changes to current law:

- Remove the veil of secrecy with respect to advice and investigations related to campaign finance and lobbying matters;
- Add two partisan members, one Democrat and one Republican, to the Government Accountability Board.

Thank you for the opportunity to share my thoughts with you. I hope this testimony will help inform the Legislature's consideration of these bills. As always, I am available to answer questions and work with you in developing proposed legislation.

Respectfully submitted,

A handwritten signature in black ink that reads "Kevin J. Kennedy". The signature is written in a cursive style with a large, prominent initial "K".

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Attachment

List of Technical Drafting Issues